Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-739

OLSON FARMS, INC.,

Petitioner,

vs.

CACKLING ACRES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 31, 1976.

CITATIONS TO OPINIONS BELOW

The unreported Memorandum Opinion of the trial court, U. S. District Court for the District of Utah, Central Division, is printed in the Appendix, at page A-1.

The Opinion of the Tenth Circuit Court of Appeals which is not yet published is printed in the Appendix at page B-1. The Order of the Tenth Circuit Court of Appeals denying Petitioner's petition for rehearing is printed in the Appendix at page C-1.

JURISDICTION

The Judgment of the Tenth Circuit Court of Appeals was entered on August 31, 1976; the Order of the Tenth Circuit Court of Appeals denying petitioner's Petition for Rehearing was entered on October 13, 1976. On October 26, 1976 the Tenth Circuit Court of Appeals stayed the mandate until November 25, 1976 pending the filing of this Petition for Certiorari. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals follow the decisions of this Court in considering the issue whether damage in fact had been proven?

STATUTORY PROVISIONS INVOLVED

15 U.S.C. Section 1, Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: *Provided,* that nothing contained in Sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and

> which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

15 U.S.C. Section 2, Monopolizing trade a felony; penalty.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with another person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred

thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

15 U.S.C. Section 15, Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This is a civil antitrust case brought under Sections 1 and 2 of the Sherman Act. Plaintiffs-Respondents are fourteen egg producers in the general Salt Lake City, Utah area. Defendant-Petitioner Olson Farms, Inc. is an egg distributor with its headquarters in North Hollywood, California and with a processing and distribution facility in Draper, Utah.

Plaintiffs alleged in their complaint that Olson Farms conspired with other egg distributors, not named as defendants in the trial, to fix and depress the prices paid to egg producers and to fix the wholesale price for eggs in violation of Section 1 of the Sherman Act. Plaintiffs also charged that Olson Farms conspired with Oakdell Egg Farms, Inc., an egg producer fifty percent owned by Olson Farms, and three other egg producers (not named as defendants) to monopolize the production of eggs in Utah in violation of Section 2 of the Sherman Act. Finally, four of the fourteen Respondents charged Olson Farms

with a unilateral attempt to monopolize the production and distribution of eggs in Utah.

Olson Farms counterclaimed against six of the Respondents charging a conspiracy to fix producer prices in violation of Section 1 of the Sherman Act and the Utah antitrust laws. The conspiracy charged by Olson Farms was entirely separate and apart from any alleged conspiratorial acts charged by the Respondents, and was based on admitted price-fixing activities of the Respondents. The Respondents claimed exemption under the Capper-Volstead Act for an agricultural cooperative (a matter that was seriously disputed) and in any event claimed that their price-fixing activities were ineffectual.

The jury awarded a verdict in favor of Respondents on all three charges. The trial court instructed the jury that damages were to be awarded only once to each Respondent. Accordingly, the jury awarded damages totaling $113,469 (before trebling) to four Respondents under the Section 1 claim, and awarded damages totaling $461,124 (before trebling) to the other ten Respondents under the Section 2 conspiracy to monopolize claim. No damages were awarded under the Section 2 attempt to monopolize claim. The damage award averaged just under 3 cents per dozen (before trebling) for the over 21,000,000 dozen eggs sold by Respondents during the four-year damage period of 1968-71. The jury found against the Petitioner on its counterclaim.

Although a great deal of evidence was presented, ultimately the proof of damages "in fact" offered by plaintiffs consisted of a three-part syllogism: (1) Utah was a deficit area in egg production; (2) Utah imported most of its deficit needs from the nearby surplus area of Southern California; (3) Utah egg producers should therefore receive

a price for their eggs that was higher than California producer prices by some premium representing the cost of dealer handling charges and transportation of eggs from California to Utah.

The Respondents relied solely on one expert witness, Dr. Rando Christensen, to establish this theory. Dr. Christensen documented the deficit needs of Utah and the importation primarily of California eggs to supply those deficit needs.

Dr. Christensen then postulated that a Utah distributor should be willing to pay a Utah egg producer the same as a California *producer* plus all of the costs incurred in buying eggs from California *distributors* and then transporting them to Utah (i.e., a premium over the California egg price). In arriving at this premium, Dr. Christensen used cost comparisons with California distributors who "jobbed" (i.e., dealer sales) eggs to Utah distributors.

As a result, not only were freight charges included in the "premium" over California egg prices, but dealer handling, overhead and profit charges were also included, something which Utah producers had never received before. Dr. Christensen computed a premium of 5 cents per dozen over the California price to which was added a 1 cent premium for local freshness (again something Utah producers had never received) to arrive at a total of 6 cents as representing the price differential which Utah producers should receive over California producers. This 6 cent premium was compared to the premium actually received, about 2 cents (the cost of freight), to arrive at a net damage figure of about 4 cents per dozen. The jury awarded almost 3 cents per dozen as damages.

The trial court permitted this theory of damages to be introduced despite the fact that there was no evidence that Utah producers had ever before received a premium over California prices of more than the cost of freight. Further, there was no evidence that egg producers in other deficit markets ever received a premium in excess of the cost of freight over egg producer prices in the nearest surplus market. Finally, there was no evidence why it was proper to compare prices at two different functional levels — Utah *producers* and California *distributors*.

It is elementary that in order to compute damages by comparison, the items compared must be substantially similar. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 392 (6th Cir. 1962); *Homewood Theatre v. Loew's Inc.*, 110 F.Supp. 398, 413 (D. Minn. 1952).

Respondents failed to show at trial any reason why the "before-after" method could not have been utilized or any reason why the "yardstick" method which was used did not compare Utah with a comparable deficit area and why comparable prices at the same functional level — producers — was not used. Both methods have been approved by this Court and are generally acceptable methods of proving damages in cases such as this. *See Bigelow v. U.S.*, 327 U.S. 251 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1926).

Instead, the trial court permitted the Respondents' expert to postulate how things ought to have been. This postulate was unsupported by evidence of any prior historical relationship or by evidence of comparison with other deficit markets. There was, therefore, no evidence of the fact of damage. Dr. Christensen admitted that the cost of production in Utah was the same as in California and that Utah producers did, in fact, receive a premium

above that received by California producers each and every year during the damage period 1968-71.

Thus the trial court's judgment, and the Circuit Court's affirmance, stands for the proposition that if a plaintiff can prove a conspiracy in violation of the antitrust laws, and if the plaintiff cannot prove damages by the "before-after" or "yardstick" tests, then the plaintiff will be permitted to proceed upon a damage theory not recognized by economic theory to establish the *fact* of damage and the *quantum* of damage.

In addition, the trial court adopted new law in its definition of the relevant geographic market for purposes of Section 2 of the Sherman Act. During trial, Dr. Christensen stated that Utah, Idaho (Franklin County, Idaho, just across the border from Utah) and California were in the same relevant market due to his own basic definition that prices tend to equalize within a geographic market — plus or minus transportation charges between the various areas of the market. Obviously here it was relevant for Dr. Christensen to compare California and Utah prices.

However, for purposes of determining monopolistic power (the "dangerous probability of monopolization" test under Section 2), Dr. Christensen concluded that Utah and Idaho constituted a "submarket" of the larger geographic market which included California. Dr. Christensen bootstrapped his way into the "submarket" concept by his *theory* of damages, i.e. that a 6 cent per dozen premium should be paid. This 6 cent premium to be received by Utah producers would put California producers at such a competitive disadvantage as to effectively isolate Utah producers into a "submarket."

In its instructions to the jury, the trial court ignored the submarket-market dichotomy utilized by Respondents during the trial, and instead merely instructed the jury that it could find for Respondents under Section 2 only if it found that the relevant market consisted of Utah and Franklin County, Idaho. In so instructing the jury, the trial court thus ignored any rationale as to why California prices would be relevant for purposes of determining damages.

The damage theory and submarket concepts were presented to the Tenth Circuit Court of Appeals. That court did not deal with the submarket-market issue at all. In its half-page treatment of the damage issue, the court stated:

> We think there was sufficient evidence of the *fact* that the plaintiffs did sustain some damage since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant — lost profits. As to the *quantum* of damage, the plaintiffs were under no burden to establish it with mathematical precision so long as the extent of such damage was not left to jury speculation. *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973); *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975). Without itemizing the testimony bearing on the damage question, our study of the voluminous record, consisting of some 7,500 pages of testimony, convinces us that the state of the record is such as to permit the jury to find and infer that plaintiffs did suffer legal injury.

Thus the damage issue was disposed by a statement that the *fact* of damage was established by expert testimony and statistical data and that the *quantum* of dam-

age was a jury question which was not based on pure speculation.

This ruling completely ignored the failure of Respondents to utilize the generally recognized "before and after" test or the "yardstick" test as outlined by this Court in *Bigelow v. RKO Pictures,* 327 U.S. 251 (1946), as the correct measure of damage. Instead the Tenth Circuit Court of Appeals summarily approved Dr. Christensen's method of establishing the fact of damage.

REASONS FOR GRANTING THE WRIT

In affirming the trial court's decision, the Tenth Circuit Court of Appeals has departed from precedent of this Court relating to the necessity of proof of the fact of damage in antitrust suits and has allowed plaintiffs to formulate a unique theory of damages when conventional theories of proof reveal that no damages had been sustained. The decision below involves an extension of federal antitrust law by recognizing relevant geographic "submarkets" without legal precedence or justification in cases involving Section 2 of the Sherman Act.

1. It is well established by this Court that before a plaintiff may recover damages he must show "proof necessary to establish the *fact* that [he] has sustained some damage." *Story Parchment Co. v. Paterson Paper Co.,* 282 U.S. 555, 561 (1931). Once this "fact" of damage has been established the plaintiff is liberally allowed to prove the *quantum* of damages based upon the theory that a defendant should bear the risk of any uncertainty as to the exact amount. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.,* 533 F.2d 510 (10th Cir. 1976). Petitioner does not quarrel with this standard. Petitioner merely asks that it be applied to the facts and evidence of this case.

A close reading of the appellate court's discussion of the damage issue leads to the conclusion that the appellate court judges simply threw up their hands and rationalized that within 7500 pages of transcript of the trial there must be sufficient evidence from which a jury could find the *fact* of damage. Once over that hurdle, it was then simple for the court to conclude that the quantum of damage was a jury question not to be left to mere speculation. The appellate court failed to separate the legal basis for plaintiffs' damage claim (establishing the *fact* of damage) from the maze of evidence offered by plaintiff to show the *quantum* of damage allegedly sustained. In other words, regardless of the thousands of pages of transcript testimony and hundreds of exhibits relating to damages, plaintiffs' claim was only as strong as the economic "theory" of Dr. Christensen to which this mass of information was applied. Without Dr. Christensen's theory there is no foundation for any showing that plaintiffs were in fact damaged.

Dr. Christensen's theory upon which plaintiffs' entire claim for damages is based does not establish the fact of damage.

a. It fails the "before-after" test in that Respondents themselves testified that the pre-conspiracy period Utah "premium" over California prices was only the cost of freight — not the cost of freight plus dealer handling charges as postulated by Dr. Christensen.

b. It fails the "yardstick" test in that Dr. Christensen made no study of any other deficit egg markets to compare the premium they received with the nearest surplus production area.

c. Neither the trial court nor the appellate court justified Dr. Christensen's comparison of prices at two different functional levels — Utah producers with California distributors.

d. Finally, Dr. Christensen's theory presumed that Utah distributors would pay Utah producers the same price for *all* of their eggs as they paid California distributors for *marginal* requirements needed to meet Utah's deficit needs. This assumption is contrary to the plaintiffs own evidence that a Utah distributor who lost his source of local supply of eggs and was forced to buy all of his eggs from other Utah distributors was forced out of business because of his lack of profit margin.

The above discussion illustrates petitioner's frustration in the court's allowance of an academic theory of "how things ought to have been" to establish both the *fact* and *quantum* of damage.

This case is closely analogous to that of *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972). In *Gray*, the court disallowed a damage calculation prepared by plaintiffs' accountant where the allegedly lost profit calculations were not based on trial testimony. Instead the damage theory was based upon plaintiffs' belief that they were entitled to additional margins and upon their unproven assumption that they could have raised their prices and not lost any business.

Thus in *Gray*, neither the "before-after" nor the "yardstick" tests were properly utilized and the appellate court properly disallowed the offer of proof of damages. In the instant case, there was no trial testimony by the plaintiffs as to a historical relationship between Utah and

California of anything other than the cost of freight which the Plaintiffs-Respondents always had received and did receive during the alleged damage period 1968-71. The Respondents' expert believed that Utah distributors should have paid more than the cost of freight differential, and he assumed that this increased cost could have been passed on at the wholesale level. This unproven assumption flies in the fact of the uncontroverted evidence presented by the Respondents themselves that the Utah wholesale market was already unrealistically high in relation to California. Petitioner made only average net profits of less than one-half cent per dozen. Accordingly, the jury award of 3 cents per dozen could neither have come from Petitioner's profits nor could it have been passed on at the wholesale level.

2. The question of submarkets of larger relevant *geographic* markets has occurred in antitrust cases involving Section 7 of the Clayton Act dealing with mergers or acquisitions which have or could tend to have anticompetitive effect in any segment of commerce. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336 (1962). A submarket in a Section 7 Clayton Act then becomes the relevant market for purpose of measuring monopolistic effect, and only for that purpose.

In the instant case, Respondents have used a submarket as a relevant market for measuring monopolistic power of the Petitioner and the co-conspirators. Then, at the same time, the submarket was itself expanded to a large market (to include California instead of just Utah and Franklin County, Idaho) for purposes of making a relevant damage comparison between two points in the same relevant market. This simultaneous gerrymandering on the subject of the relevant market has never been

dealt with before. The Circuit Court has de facto adopted this manner of delineating markets and submarkets.

There was no evidence introduced at trial as to why California was relevant for damage calculation except that California was defined, by the Respondents (and by Petitioner) as being in the relevant market. Since the jury was instructed that only Utah and Franklin County, Idaho had to be considered as the relevant market before a verdict in favor of plaintiffs could be reached, there was no more basis for comparison of Utah prices with California than with Alaska or even China.

The question of proof of damages is the lifeblood of any litigation. This is especially true in antitrust cases involving complex economic data. If a trial court fails to carefully consider the theory upon which a plaintiff relies in proving damages the defendant is required to engage in a battle that should never be fought. A jury is left to ponder the testimony of many witnesses and to sort through hundreds of exhibits. An appellate court is faced with a monumental record to unravel.

It is readily apparent that if this mass of "damage" confusion must occur there must be sufficient legal foundation to justify the high costs involved to the litigants and the judicial system. The failure of the trial court and the Circuit Court of Appeals in this case to carefully examine plaintiffs' foundational damage theory mandates a review by this Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CACKLING ACRES, INC., et al.,

Plaintiffs,

v.

OLSON FARMS, INC., et al.,

Defendants.

Judgment C 296-71

This action came on for trial before the above-entitled court, sitting with a jury, with the Honorable Aldon J. Anderson, District Judge, presiding, on the claims of the plaintiffs under Sections 1 and 2 of the Sherman Act, 15 U.S.C §§ 1 and 2, and the counterclaims of defendant Olson Farms, Inc. under Section 1 of the Sherman Act and the Utah Antitrust Laws, and the jury having returned its verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That each of the plaintiffs is entitled to have the actual damages awarded to it or him by the jury in its verdict trebled, in accordance with 15 U.S.C. § 15.

2. That the plaintiffs do have and recover from the defendant Olson Farms, Inc., 3855 Lankershim Boulevard, North Hollywood, California, the sums set opposite their respective names below, in which respect the amount found by the jury has been trebled, together with interest thereon at the rate of eight percent (8%) per annum from the date of judgment until paid:

a. LaVar Bateman and B & T Farms, Inc., for and on behalf of LaVar Bateman	$ 90,723.00
b. Bromley Farms, Inc., Adair W. Bromley, Michael F. Bromley, Bromley Farms, a partnership, A. W. Bromley & Son, a partnership and B & T Farms, Inc., for and on behalf of said plaintiffs	284,103.00
c. Preston C. Butterfield	73,272.00
d. Cackling Acres, Inc.	39,693.00
e. Donald L. Carpenter	70,668.00
f. Cecil W. Henke, Paul H. Henke, Valley Pride Egg Farms, a partnership	96,771.00
g. Harold Howlett & Sons, Inc.	307,671.00
h. Al Rigtrup, Bud J. Shepherd and Leon Zeeman (Lakeshore Egg Farms Group)	22,392.00
i. Al Rigtrup and Rigtrup Hatcheries	97,581.00
j. Ritchies, Inc., Leon Ritchie, James W. Ritchie, Ritchies, a partnership	139,323.00
k. Bud J. Shepherd	112,317.00
l. Stanley C. Sumsion	92,679.00
m. James Richard Tattersall, Tattersall Farms, a limited partnership, James Richard Tattersall, Trustee of the James H. Tattersall Personal Trust, Myrle B. Tattersall, James H. Tattersall, a partnership and B & T Farms, Inc., for and on behalf of said plaintiffs	196,251.00
n. Leon Zeeman	100,335.00

3. That as to defendant's counterclaim, no cause of action.

4. That the plaintiffs, and each of them, do have and recover their costs and disbursements in this action from defendant Olson Farms, Inc.

5. Pursuant to the order entered heretofore, and under the authority of Rule 54(b), Fed. R. Civ. P., this court directs the entry of this monetary award for the purpose of determining the commencement of interest due. However, this judgment shall not be considered a final judgment for purposes of post-judgment motions, enforcement of the judgment, or for appeal until the determination of the residual issues of attorneys' fees and injunctive relief.

DATED this 26th day of April, 1974.

ALDON J. ANDERSON
United States District Judge

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 74-1850

CACKLING ACRES, INC., et al.,

Plaintiffs and Appellees,

v.

OLSON FARMS, INC.,

Defendant and Appellant.

Appeal from the United States District Court
for the District of Utah, Central Division.
(D. C. Civil No. C-296-71)

Filed August 31, 1976

Before LEWIS, Chief Judge, BREITENSTEIN, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a civil antitrust case brought under the Sherman and Robinson-Patman acts and the antitrust laws of the State of Utah. The plaintiffs are fourteen egg producers, some of whom are also egg distributors. Olson Farms, Inc., one of the defendants, is an egg distributor, with its home office in North Hollywood, California. During the time crucial to the present proceeding Olson Farms also had a processing plant and distribution center in Draper, Utah. A second defendant, Oakdell Egg Farms, Inc., is an egg production facility located in Riverton, Utah. Olson Farms owns a one-half interest in Oakdell.

The plaintiffs commenced this suit as a class action. However, the trial court refused to certify the case as a class action, and the matter came on for trial on behalf of the named plaintiffs only. The plaintiffs charged Olson Farms with violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as violations of the Robinson-Patman Act, 15 U.S.C. § 13, and the antitrust laws of Utah. The gist of the complaint was that Olson Farms had conspired with other egg distributors to fix and depress the prices paid to egg producers and that Olson Farms had also conspired with others to fix the wholesale price of eggs. Additionally, the plaintiffs charged Olson Farms with conspiring with other distributors and egg producers to monopolize the production and distribution of eggs in Utah.

Olson Farms filed a counterclaim against certain of the plaintiffs, alleging commercial disparagement, business interference, violations of the Utah Unfair Practices Act, price discrimination, price fixing and other combinations and conspiracies in restraint of trade.

Prior to trial the plaintiffs withdrew their claims based on the Robinson-Patman Act and the antitrust laws of Utah. After a prolonged trial of some two and one-half months, the case was submitted to a jury on a special verdict. This special verdict permitted, but did not require, recovery for the individual plaintiffs under either (1) a restraint of trade violation of section 1 of the Sherman Act, or (2) a conspiracy to monopolize violation of section 2 of the Sherman Act, or (3) an attempt to monopolize violation of section 2 of the Sherman Act. The jury was instructed that an individual plaintiff could only recover once, and the damages of each plaintiff were to be determined on an individual basis. The jury returned a verdict for four of the plaintiffs on the basis of a restraint of trade violation. The individual damages awarded these four plaintiffs totaled $113,469. The remaining ten plaintiffs were each awarded damages for a conspiracy to monopolize violation and their invidual awards totaled $461,124.

The counterclaim of Olson Farms was also submitted to the jury, which returned verdicts in favor of the plaintiffs on the issue of liability. In responding to specific inquiry, the jury determined that no damages were sustained by Olson Farms as a result of the plaintiffs' activity. As a result, a judgment of no cause of action was entered with respect to the counterclaim.

The trial court later entered money judgments in favor of the plaintiffs and trebled the jury verdicts. The money judgments ran against Olson Farms only, as injunctive relief was the only relief granted the plaintiffs against the other defendant, Oakdell Farms. As indicated, a judgment of no cause of action was also entered with respect to the counterclaim of Olson Farms. The latter now appeals both judgments.

Olson Farms summarizes its several grounds for reversal as follows: (1) the plaintiffs failed to prove either a restraint of trade or a conspiracy to monopolize violation of either section 1 or 2 of the Sherman Act, (2) the plaintiffs failed to prove any damage, (3) the jury verdict was internally inconsistent and in any event not supported by the evidence, (4) the trial court erred in its instructions to the jury, and (5) the trial court erred in refusing to direct a verdict in favor of Olson Farms on its counterclaim.

I. SUFFICIENCY OF EVIDENCE

Olson Farms initially argues that there was insufficient evidence to warrant submission of the case to the jury, be it on the basis of either a section 1 or section 2 violation of the Sherman Act. We disagree and in our view the matter was properly submitted to the jury.

As concerns section 1 of the Act, it was plaintiffs' theory of the case that Olson Farms conspired with other named egg distributors, and additionally conspired with certain egg producers, to depress and fix the price to be paid to egg producers in Utah and in the southern part of Idaho. Olson Farms' position is that there was in reality no evidence of any price fixing efforts, while the plaintiffs counter with the assertion that there was much evidence, both direct and circumstantial, oral as well as written in nature, which, when viewed in its totality, overwhelmingly established that Olson Farms conspired with others to depress the price paid to egg producers in the Utah-Idaho area, and that in fact Olson Farms succeeded in thus depressing these egg prices. As indicated, we are of the view that the state of the record was such as to require submission of the matter to the jury. It would have been error for the trial court to take the case from

the jury and direct a verdict for Olson Farms on the grounds that there was insufficient evidence of a section 1 violation.

Olson Farms suggests that the only possible evidence tending to show price fixing was testimony pertaining to price parallelism between the prices paid by Olson Farms to egg producers and the prices paid by its named co-conspirators. In the instant case, according to Olson Farms, the evidence of price parallelism, such as it was, resulted only from "lawful factors." In this regard, Olson Farms argues that it had a position of leadership in the Utah-Idaho area, and that it was only natural that other egg dealers would pay the same price for eggs as did Olson Farms.

We agree that price parallelism, standing alone, does not necessarily prove a conspiracy to fix prices. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956). However, the fact that price parallelism exists becomes a significant factor and may help to support a finding of conspiracy where it is accompanied by evidence of behavior calculated to fix prices. A conspiracy must be judged by its constituent parts and the jury must look at the alleged conspiracy in its totality. A conspiracy may be implied by a course of conduct and other circumstantial evidence. E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296 (10th Cir. 1975); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); United States v. Armour & Co., 137 F.2d 269 (10th Cir. 1943); United States v. Wohl Shoe Co., 369 F.Supp. 386 (D. N.M. 1974).

In the instant case, the plaintiffs did not rely on price parallelism alone to prove that Olson Farms and its alleged conspirators forced downward the price paid to Utah-Idaho egg producers. There was other evidence, which the jury apparently chose to believe, that representatives of Olson Farms and its co-conspirators had numerous meetings at Harman's Cafe, and that in addition thereto, there were constant telephone calls between the various conspirators, all in furtherance of the conspiracy to peg egg prices in the Utah-Idaho area. Also, there was certain documentary evidence, namely correspondence, between Gil Cochran, who was in charge of Olson Farms' operations in Utah, and his business superiors, which, in our view, was quite damaging to Olson Farms and amply permitted the inference that Olson Farms was acting in concert with others to depress the prices paid to Utah-Idaho egg producers. All in all, the evidence in our view was of such nature as to require submission to the jury of the alleged section 1 violation. *See* Standard Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220 (10th Cir. 1973), *cert. denied,* 414 U.S. 829 (1973).

As concerns the section 2 violation, Olson Farms contends that there was insufficient evidence to show that it in any wise conspired or attempted to monopolize the relevant geographical egg market. In this regard there was a very definite difference of opinion as to just what constituted the relevant geographic market. The plaintiffs' position was that Utah and the southern part of Idaho constituted the relevant geographic market, and their evidence was designed to show monopoly power in that particular area. Olson Farms, on the other hand, contended that the relevant geographic market included southern California in addition to Utah and southern Idaho, and that there was no evidence that Olson Farms exercised monopoly powers in this broadened geographic market. Olson urged inclusion of southern California in the market, because from time to time it served as a source of egg supply when there was a shortage of Utah eggs. Accordingly, argued Olson, there was a degree of correlation between the price paid egg producers in southern California and Utah. Such fact does not, in our view, necessarily mean that southern California was a part of the relevant geographical market. The trial court in effect submitted to the jury the question as to just what constituted the relevant geographical market, by instructing the jury that before any plaintiff could recover on a section 2 violation, such plaintiff must establish by a preponderance of the evidence that Olson Farms had monopolistic power in Utah and southern Idaho, and that absent such a showing there could be no recovery on the section 2 phase of the case. Under the facts of the case we find no error in the trial court's handling of this matter.

The relevant geographic market is seldom fixed by metes and bounds. *See* United States v. Pabst Brewing Co., 384 U.S. 546 (1966). *Compare* United States v. Grinnell Corp., 384 U.S. 536 (1966). In the case at hand, there was a difference of opinion as to what constituted the relevant geographic market, and in such circumstance it is best left to the plaintiff to establish by a preponderance of the evidence the area in which anti-competitive conduct has its impact. It was clearly proper to submit the issue to the jury.

With regard to the section 2 violation, Olson also contends that there was insufficient evidence to show a dangerous probability that Olson would monopolize the market in even the Utah-Idaho area, or that it possessed the necessary specific intent to do so. We think these issues were also properly submitted to the jury. Viewing the

evidence in its entirety, it is clear that reasonable minds could find a violation of section 2 based upon a course of conduct and other circumstances which tended to show Olson's domination in the Utah-Idaho egg market, its intent to control the egg producer paying price and therefore dominate the market and the predatory means used to accomplish this purpose. *See American Tobacco, supra,* and Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961).

In sum, then, we find no error in the trial court's submission of these alleged antitrust violations to the jury. Conspiracies to fix prices or monopolize or attempt to monopolize in a given geographical area are generally established by the facts and circumstances of the entire case, and are seldom established by direct evidence of the eye-witness variety. In the instant case, it would have been error for the trial court to have directed a verdict for Olson Farms.

II. DAMAGES

Olson Farms initially contends that there was no evidence that any of the several plaintiffs sustained any damage as a result of any possible antitrust violations by Olson Farms and its alleged co-conspirators, be it under section 1 or 2, and that accordingly, it was error for the trial court to submit the case to the jury.

We agree that an essential of the plaintiffs' antitrust claim is proof of some resultant economic damage; in fact, proof of economic damage to their "business or property" is a necessary precondition to their recovery of treble damages under the Clayton Act. 15 U.S.C. § 15; *see Areeda, Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127 (1976). We think there was sufficient evidence of the *fact* that the plaintiffs did sustain some damage since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant — lost profits. As to the *quantam* of damage, the plaintiffs were under no burden to establish it with mathematical precision so long as the extent of such damage was not left to jury speculation. Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir. 1973); Story Parchment Co. v. Paterson Co., 282 U.S. 555 (1931); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975). Without itemizing the testimony bearing on the damage question, our study of the voluminous record, consisting of some 7,500 pages of testimony, convinces us that the state of the record is such as to permit the jury to find and infer that the plaintiffs did suffer legal injury.

Olson Farms also attacks the verdicts returned by the jury, contending that the several verdicts are internally inconsistent and should not be permitted to stand. The special verdicts submitted to the jury were perhaps a bit unusual, and deserve some comment. When the case was submitted to the jury, three alternative grounds for recovery were made available. The first was a section 1 violation of the Sherman Act involving a conspiracy to restrain trade. In connection therewith the jury was instructed that if they found the issues in favor of an individual plaintiff and against Olson Farms, they should write a "yes" opposite the name of the particular plaintiff in whose favor they were finding. If they did not find for a particular plaintiff, the jury was instructed to write "no" opposite such plaintiff's name. If the jury found for a plaintiff, they were further instructed to enter the "total amount of proximately resulting damage, if any, that said plaintiff is entitled to by plaintiff's name." The

jury wrote "yes" in front of each of the fourteen plaintiffs and awarded damages to four of the fourteen plaintiffs totaling $113,469.

Another portion of the special verdict related to the conspiracy to monopolize violation under section 2 of the Sherman Act. Again were listed the names of the individual plaintiffs and again the jury was instructed to write "yes" or "no" by each name, depending upon whether or not they found in favor of a particular plaintiff. The jury wrote "yes" in front of the name of each of the fourteen plaintiffs. Concerning damages, the jury was instructed that if they had awarded any plaintiff damages under the section 1 violation, they should not award such plaintiff additional damages under the section 2 violation. If, however, a particular plaintiff had not been awarded any damage under the section 1 claim, and the jury had found, as to a particular plaintiff, that there was a section 2 violation, then the particular plaintiff could be awarded damages under the section 2 claim. In line therewith the jury proceeded to award damages to the ten plaintiffs who had not been awarded damages under the section 1 claim. Damages thus awarded these ten plaintiffs totaled $461,124.

To round out the verdict picture, although it has no particular bearing on this present appeal, the third portion of the special verdict related to a section 2 claim based on an attempt to monopolize. Such related to the claims of four plaintiffs only. In this connection the jury wrote "yes" in front of the name of each of the names of the four plaintiffs listed in the verdict, but awarded no damages since each of the four had already been awarded damages under either the restraint of trade claim or the claim based on a conspiracy to monopolize.

Other instructions to the jury clearly indicated that the gravamen of each of the plaintiffs' first two claims, namely, the restraint of trade violation under section 1, and the conspiracy to monopolize under section 2, was that as a result of such activity the price of eggs paid by Olson Farms and other egg distributors to egg producers was fixed and depressed. In other words, whether Olson Farms be found guilty of restraint of trade or conspiracy to monopolize, or both, the resulting damage was the same, namely, fixed and depressed prices paid to egg producers for their eggs.

As indicated, then, in this setting the jury found that Olson Farms had been guilty of a restraint of trade violation of section 1 of the Act, as well as a conspiracy to monopolize violation of section 2, as to each of the fourteen plaintiffs. "Yes" was placed opposite the name of each plaintiff as concerns both alleged violations of the Act. Does the fact that the jury awarded four plaintiffs damages under the first claim, and awarded the remaining ten plaintiffs under the second claim, render the verdicts inconsistent? We think not.

There is the suggestion that since the jury did not award ten of the plaintiffs any damages under the plaintiffs' first claim based on restraint of trade, the jury in effect found that none of these ten had in fact sustained any damage. Accordingly, assert counsel, it was inconsistent for the jury to turn around and award damages to these ten plaintiffs under their second claim based on a conspiracy to monopolize. The mere fact that the jury did not affirmatively award damages to ten of the plaintiffs on the section 1 claim does not necessarily mean that the jury found no damages had been sustained with respect to those ten plaintiffs. Such reasoning is of course contradicted by the fact that the jury did award these ten

plaintiffs damages on their second claim based on conspiracy to monopolize, which, as above indicated, resulted in fixed and depressed egg prices for egg producers. Additionally, it should be remembered that as concerns the first claim based on restraint of trade, the jury found in favor of all fourteen plaintiffs and against Olson Farms on the liability issue, and, while awarding damages to four plaintiffs, left the damage blanks opposite the remaining ten plaintiffs blank. This is quite different from the verdict returned by the jury on Olson Farms' counterclaim, about which more will be said later. On Olson Farms' counterclaim the jury answered "no" as to liability, and also wrote in the word "none" as to the damage suffered by Olson Farms as a result of the alleged violation of antitrust law by the four plaintiffs against whom the counterclaim was directed.

In sum, then, on this particular matter it should be remembered that the jury affirmatively found that as concerns all fourteen plaintiffs, Olson Farms was liable to respond both on the basis of a restraint of trade violation as well as a conspiracy to monopolize violation. In line with the trial court's instruction that the individual plaintiffs could be awarded damages under either the first claim, or second, but not both, the jury awarded four plaintiffs damages under the first claim, and awarded damages to the remaining ten under the second claim. We do not find such to be inconsistent. In this regard we note that though there was considerable discussion prior to the time the instructions and forms of verdict were given the jury concerning the matter of instructions and forms of verdict, after the instructions and forms of verdict were given the jury, counsel for Olson Farms voiced no objections to the forms of verdict. Nor when the verdicts were returned and the jury polled, was there any suggestion

that the verdicts were inconsistent or repugnant, one to the other.

III. INSTRUCTIONS

Olson Farms contends that a new trial should be ordered on the basis of the instructions given the jury by the trial court. Complaint is made about instructions tendered and marked refused, as well as the instructions which were actually given the jury. It is said that the instructions as a whole were "weighted" in favor of the plaintiffs. We do not agree with this appraisal. Many of the instructions submitted by Olson Farms were given, in substance, by the trial court, though not in the precise language asked for. Without getting into a specific discussion as to the several instructions here under attack, it is sufficient to say that our study of the instructions, when considered as a whole, leads us to conclude that they were adequate and apprised the jury in understandable language of the rather complex issues which were being submitted. *See* Gradsky v. Sperry Rand Corp., 489 F.2d 502 (6th Cir. 1973). There is no reversible error as concerns the instructions given, or refused.

IV. OLSON FARMS' COUNTERCLAIM

As indicated, Olson Farms filed a counterclaim alleging that six of the fourteen plaintiffs were themselves guilty of antitrust violations. The underlying basis for the counterclaim was that these plaintiffs, and others, had at one time formed an egg council whose alleged purpose was to raise the prices being paid egg producers. The six plaintiffs thus charged with antitrust violations of their own, denied such activity, alternatively asserted that Olson Farms had sustained no injury from any possible activity on their part that might be deemed in violation

of the Sherman Act, and that, in any event, such activity would be exempt from the antitrust laws under the provisions of the Capper-Volstead Act. 7 U.S.C. §§ 291, 292.

Olson Farms at the conclusion of all the evidence sought a directed verdict in its favor on the counterclaim. This request was denied and the trial court submitted to the jury all issues raised by the counterclaim. The jury returned a verdict which stated that none of the six plaintiffs was liable to Olson Farms. Additionally, the jury in its verdict found that *no* damage had been sustained by Olson Farms by virtue of any activity of the six plaintiffs.

In our view the trial court did not err in refusing to direct a verdict in favor of Olson Farms on its counterclaim. The issue of liability, or no, on the part of any of the six plaintiffs to Olson Farms was for the jury. The fact that by the verdict we cannot now tell whether the jury found no predatory conduct, or that such conduct was exempt under the Capper-Volstead Act, is of no particular consequence, since the jury also found that Olson Farms had suffered no damage, in fact, as the result of any activity by these six plaintiffs. In no circumstance could Olson Farms recover on its counterclaim unless it in fact sustained some damage. The evidence is such as to amply permit the inference that any efforts by the six plaintiffs to raise the price paid to egg producers were totally ineffective. In fact, Olson Farms' Utah manager characterized the egg marketing council to be nothing but a "Mickey Mouse Club."

Finding no reversible error, we AFFIRM.

APPENDIX C

Opinion of the Court of Appeals

SEPTEMBER TERM — October 13, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 74-1850

CACKLING ACRES, INC., et al,
Plaintiffs-Appellees,

vs.

OLSON FARMS, INC., et al,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis, Senior Judge Breitenstein and Circuit Judge McWilliams to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

Linda A. Hall
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 10 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-739

OLSON FARMS, INC., PETITIONER

v.

CACKLING ACRES, INC., *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B-1—B-14)[1] is reported at 542 F.2d 242.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered August 31, 1976. A Petition for Rehearing was denied October 13, 1976. The Petition for a Writ of Certiorari was filed November 26, 1976. The jurisdiction of this Court is established by 28 U.S.C. §1254(1).

[1] "Pet. App." refers to the appendix to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1) Whether petitioner is precluded from contending in this Court that there was insufficient proof of the fact of damage when petitioner did not raise the issue in the court below; and whether petitioner is precluded from challenging here the evidence of the measure of damages since the issue is not stated as a question presented.

2) Whether the Court of Appeals followed the decisons of this Court in determining that there was sufficient evidence for the jury to find damage in fact under Section 4 of the Clayton Act.

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. . . .

STATEMENT OF THE CASE

Respondents, fourteen egg producers, all located in the State of Utah, filed this suit December 21, 1971, against Olson Farms, Inc. (hereafter "Olson"), the world's largest independent distributor of eggs (App. 1012).[2] All fourteen charged Olson, the petitioner, with: 1) conspiring with all other major distributors in

[2] "App." refers to the joint appendix filed by the parties in the Court of Appeals.

BEST COPY AVAILABLE

Utah to fix depressed prices paid by the distributors to producers of eggs and to fix depressed wholesale prices in Utah and 2) conspiring to monopolize the production and distribution of eggs in the Utah market area.[3]

Four of the fourteen also charged Olson with attempting to monopolize the production and distribution of eggs in Utah. The claims were made under Sections 1 and 2 of the Sherman Act. Damages were sought for the period from December 21, 1968, through December 21, 1971. Olson filed a counterclaim against six plaintiffs, alleging that they had conspired to fix the prices paid by Olson for eggs at an artificially high level.

On March 21, 1974, after a two-month trial before the Honorable Aldon J. Anderson, a jury returned verdicts in favor of all the plaintiffs on each of the conspiracy claims and in favor of the four plaintiffs on the attempt to monopolize claim. The jury, on Olson's counterclaim, specifically found both no liability and no damage.

The trial court had instructed the jury that it must find both the fact of damage and a reasonable basis in the evidence for measuring the quantum of damages before it could return a verdict of liability with respect to any plaintiff as to each of the three claims

[3] The Utah market area was defined as the State of Utah with respect to distribution and Utah and Franklin County, Idaho, with respect to production.

made against Olson Farms (App. 1118, 1122, 1127). Olson has not contested the validity of those instructions either in the court below or in this Court.

The plaintiffs asserted the same theory as to the measure of damages suffered by them under each claim. The trial court instructed the jury to return separate verdicts on each of plaintiffs' three claims and on Olson's counterclaim. To avoid any confusion which might have resulted from multiple awards of damages to the same plaintiff, the trial court instructed the jury that if it found Olson liable to a plaintiff or plaintiffs on more than one claim that the amount of damages sustained by a plaintiff, if any, should be entered only under one of the claims. Since the jury found liability on all claims, which under the instructions necessarily included a finding of damage, the verdict against Olson under each claim established a right in each plaintiff to recover under each claim to which it was a party the amount of damage awarded by the jury, regardless of which claim the jury chose to put the money figure under. The lower court so ruled (Pet. B-11—B-12), and that ruling is not challenged here. Of course, the plaintiff was entitled to recover that amount only once. Thus, each plaintiff has a right to recover the damage awarded it either under the Section 1 conspiracy claim or under the Section 2 conspiracy claim.[4]

Olson argues that the only evidence of the fact of

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[4] The four plaintiffs asserting the attempt to monopolize claim also have a legal right to the damage award under that claim because of the finding of liability which necessarily included a finding of damage in fact and quantum of damages.

damage was the testimony of plaintiffs' expert who compared Utah producer prices with California producer prices plus transfer costs to Utah (Pet. pp. 5-6). Petitioner is in error. Evidence of the fact of damage was abundant and multi-faceted.

The evidence showed that Olson had a well-defined corporate policy for monopolizing a market by driving both producers and dealers out of business. A former Olson executive testified that Olson's philosophy was to always achieve "market dominance" in any market it entered (App. 11). To this end, employees were directed 1) to reduce the number of sellers and buyers in a market to prevent "wipsaws" over price (App. 31); 2) to take ten accounts of competitors for every account which a competitor took of Olson's (App. 12); 3) to seek to remove competitors by acquiring them (App. 14); and 4) to control the source of competitor's eggs, and, "if need be, attempt to keep those eggs from coming to the market," such as by purchasing them from the competitor's supplier or arranging to have them "diverted" from him (App. 11). These practices were used in the Utah market area.

Olson's manager was sent here with instructions to drive out of business all but two or three distributors in the Utah market by "whatever means were necessary" (App. 37-38). Olson's manager also stated there would be a "shakeout of producers [and that] there would be only six or seven producers left" (App. 71-72).

Olson and its co-conspirators engaged in a number

of predatory practices against both small dealers and egg producers pursuant to the conspiracy to monopolize. Olson penalized producers who refused to sell their entire supply of eggs to Olson by paying them 5 cents per dozen less for their eggs (Pl. Ex. 2) thereby depriving producers of their profit margin if they split their supply of eggs. This penalty was exacted regardless of the volume and quality of the eggs sold by the producer. The effect was to prevent producers from competing with Olson by selling directly to retail accounts. It also had the effect of diverting eggs from small dealers who once provided an element of competition in the market area. Olson and Countryside Egg Farms, a co-conspirator dealer, offered highly discriminatory prices to accounts of a small producer-dealer which attempted to sell directly to retailers. The prices offered by Olson and Countryside, were at or near the prices paid to producers by Olson to acquire the eggs (see App. 119-20, 122). Olson also agreed to divide territories and to allocate customers (e.g. App. 188-94). Independent documentary evidence from petitioner's own files established that petitioner was part of a conspiracy to depress producer and wholesale prices (Pl. Ex. 243). For the period 1968-1971 producers were paid prices that in some instances were barely above their costs and in many instances were *below* the cost of production (Def. Ex. 2; pl. Ex. 204; App. 980).

Olson's plan to monopolize the Utah market area entered its last stages in the last quarter of 1970 and the year 1971. In the latter part of 1970, Olson commenced operation, with two other co-conspirators,

of an egg production unit called "Oakdell Egg Farms" which was named as a defendant in this action.[3] Shortly before Oakdell commenced operation, Olson drove the price of eggs in Utah to levels that were at all time low levels. The prices paid by Olson and its conspirators to producers were on frequent occasions in 1971 *below direct costs.* (Compare Tr. 2938, Pl. Ex. 248, 249, 250). For a substantial portion of the latter part of 1970 and a large part of 1971, producer prices in Utah (although still a deficit area) were at or below the prices paid producers in the surplus area of southern California. Nevertheless, Olson Farms as a distributor made record profits in Utah in 1971, even a "monopoly profit" measured against standards in the industry (Df. Ex. WW, XX, Tr. 2661-62).

Olson's tactics were effective especially against producers. When Olson entered the Utah market in 1966, there were several hundred Utah producers of eggs (App. 201-02) and a number of independent distributors of eggs. The dealers competed in price for the eggs of Utah producers (e.g. App. 483-84, 1032). No such competition existed after Olson's entry into the Utah market (e.g. App. 177-178, 255, 256). Also after Olson's entry, Olson and its co-conspirator dealers "dictated" the prices producers were to receive (App. 375-377). Producer prices for a large part of the limitations period were held at, or barely above the costs of production (Def. Ex. 2; Pl. Ex. 204; App.

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[3] Oakdell Farms, Inc., was owned 50% by Olson Farms, and 50% by Paul and Marlow Woodward, both of whom were name co-conspirators.

980). As a consequence, there was a "marked increase" in the number of producers who went out of business (App. 147). By 1971, only four major independent distributors were still in operation in the Utah market area, and two of them, Olson and co-conspirator Countryside Egg Farms, controlled 72% of the distribution of eggs in the Utah market area, and all the co-conspirator dealers distributed over 90% of the eggs in Utah (Compare Pl. Ex. 83 with Tr. 874, 875); See also Pl. Ex. 275). By the time the Complaint was filed, there were only 17 commercial producers left in the State of Utah (App. 201-02). Fourteen of them are plaintiffs in this action, and the other three were named as co-conspirators.

The above demonstrates that the record is replete with evidence of the fact of damage, apart from plaintiffs' expert's testimony which went both to the fact and quantum of damage.

Plaintiff and defendant, to prove damages on their respective claims, relied on exactly the same basic formula—the formula that defendant now, for the first time and erroneously, claims is "not recognized by economic theory" (Pet. p. 8). The formula is that the price of eggs in a competitive deficit market (Utah) should equal the prices paid producers in the nearest surplus producing area, *i.e.*, Southern California, plus the "transfer costs" to Utah. This formula produces a "landed cost" in Utah.

The foundation for the economic theory was established primarily by plaintiffs' expert, Dr. Rondo Christ-

ensen,[6] who testified that under "competitive conditions, that if the local area were deficit in its production of eggs . . . that eggs would be imported from the nearest surplus area, which tends to be California" (App. 714). Dr. Christensen testified that to encourage production in the deficit area under normal competitive conditions, that the "local price" would reflect the price in California plus transfer costs, which is . . . *typical in all our [agricultural commodities]* (App. 845) (emphasis added). It was undisputed at trial that Utah was a deficit production area for the limitations period, and that California was the nearest surplus production area for the limitations period.

Petitioner's contention that the damage theory is not "recognized by economic theory" (Pet. p. 8), is simply erroneous. There is not a shred of evidence to support petitioner's contention.

Indeed Dr. Royce Anderson, an economic expert for Olson Farms, concurred in the basic economic theory

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[6] Dr. Christensen's qualifications as an expert are impressive. He has taught courses in marketing, farm accounting, farm and ranch accounting, cooperatives, public policy and research in the area of dairy marketing since 1957 (App. 612-13); has done research relating to marketing in the egg industry; substantial work in statistics in the areas of pricing, production, yields, and income (App. 613); has made statistical studies using state, federal, and private statistics for the benefit of farmers, ranchers and others (App. 613); has engaged in farm production planning, including projections on prices at given levels of production, yield, and income (App. 613); has authored sixty or seventy publications covering the above areas (App. 620-21); has had practical experience as an agricultural economist with the Bank of America and as an advisor to a marketing association for the United States International Agency for Development and the Bolivian Ministry of Agriculture (App. 617-618).

(Tr. 6719, 6737-38). In fact, defendant's damage exhibit itself was based on that exact same theory (see D-8, p. 2).

In other words, the dispute at trial on damages was what the cost to a distributor in Utah was for a California egg "landed" in Utah. Petitioner is simply in error in asserting that the plaintiffs attempted to compare Utah producer prices with California jobber prices (Pet. p. 6). All costs not associated with the cost of landing a California egg in Utah were disregarded in all the damage studies done by Dr. Christensen.

In short, the only difference between the plaintiffs and Olson Farms in computing the measure of damages was a strictly factual difference—what the amount of the "transfer costs" were. Defendant's expert testified that "the transfer cost was the cost of freight" (Tr. 6737), but admitted that he had never made a sudy to determine whether there were additional costs and admitted that there might be some (Tr. 6738-6741). Dr. Christensen's study of transfer costs was not theoretical; it was based upon the actual experience of Olson Farms, Safeway, and Associated Food Stores[7] in importing eggs from southern California over extended periods of time, and the costs they paid for importing those eggs whether imported from producers or from producer-dealers (see Pl. Exs. 90, 278, 285; App. 760-62, 844, 891-92). The experience of each

[7] Safeway and Associated Food Stores were also named as co-conspirators.

company amply supported the plaintiffs' position that transportation was not the only factor which had to be taken into account in arriving at the price of a "landed egg" in Utah. Additional breakage, handling charges, occasional double processing of eggs, and other costs are also incurred. Indeed, plaintiffs' estimate of the transfer costs was highly conservative measured by the experience of Olson Farms, Safeway and Associated Foods. At no time did plaintiffs compare Utah producer prices and California distributor prices as contended by Petitioner. (Pet. p. 6).

Finally, petitioner erroneously claims that there was no evidence to support the "premium for local freshness, dealer convenience," portion of plaintiff's damage exhibit (Pet. p. 6). In the first place, plaintiffs made no claim whatsoever for a premium for local freshness.[8] The amount claimed for dealer convenience did, however, have substantial support in the evidence, including the testimony of Olson Farms' Chief Executive Officer (App. 234, 902-03).

Finally, Olson's contention that historically the only differential that existed between California producer prices and Utah producer prices was the cost of transportation is not supported by the record. Many were aware that transfer costs included more than freight, but had no precise information as to additional costs. (See e.g. App. 398, 461-62, 540-41).

The petitioner did not contend in the court below

[8] The claim for a premium for freshment was dropped in the trial court.

that there was no evidence of the "fact of damage." Petitioner attacked the sufficiency of the evidence on the liability aspects of the case, and with respect to damages, charged that there was insufficient evidence to show the quantum of damages.[9]

The lower court, after canvassing the record of some 7,500 pages and several hundred exhibits, ruled it "would have been error for the trial court not to have submitted the case to the jury (Pet. B-8). It also specifically held that there was sufficient evidence of the fact of damage. The court stated (Pet. B-8—B-9):

> We think there was sufficient evidence of the *fact* that the plaintiff did sustain some damage, since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant—lots profits.

That court also referred to other evidence, apart from the statistical data and expert testimony, to support a finding of the "fact of damage." The court stated (Pet. B-6):

> There was certain documentary evidence . . . which, in our view, was quite damaging to Olson Farms and amply permitted the inference that Olson Farms was acting in concert with others *to depress the prices paid to Utah-Idaho egg producers* (emphasis added).

The court also noted, in connection with the causation issue (Pet. B-11):

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[9] See Brief of Olson Farms in the Court of Appeals, pp. 44-60.

> [The] instructions to the jury clearly indicated that the gravamen of each of the plaintiffs' first two claims, namely, the restraint of trade violation under Section 1, and the conspiracy to monopolize under Section 2, was that as a result of such activity, *the price of eggs paid by Olson Farms and other egg distributors to egg producers was fixed and depressed* (emphasis added).

ARGUMENT

The Petition for a Writ of Certiorari does not warrant plenary review by this Court. The sole issue presented for review by petitioner is whether the lower court properly applied the decisions of this Court "in considering the issue whether damage in fact had been proved" (Pet. p. 2). Petitioner does not contend that the decsion of the lower court is in conflict with any other court of appeals; nor does it contend that the case involves a novel legal principle under the antitrust laws which will have any application beyond the confines of this case. The dispute is solely a factual dispute which was properly decided by a jury and properly affirmed by the court of appeals, even though the issue of the "fact of damage," as such, was not presented to the lower court. Furthermore, Petitioner did not raise the sufficiency of the evidence as to "fact of damage" in the court below. For these reasons, we submit that the Petition for the Writ should not be granted.

1. In the section of the Petition entitled "Reasons for Granting the Writ" (Pet. p. 10), petitioner claims

that plaintiffs failed to show the "fact" of damage. *Story Parchment Co. v. Paterson Paper Co.*, 282 U.S. 555 (1931) stands for the proposition that a jury verdict on the fact of damage "must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment would draw an opposite conclusion . . ." (282 U.S. at 556). This rule is fully applicable in this case; The finding of damage in fact and the quantum of damage is amply supported by an abundance of evidence from a variety of sources.

Olson Farms contends that the sole evidence of the "fact of damage" was supplied by plaintiffs' expert witness, Dr. Rondo Christensen (Pet. pp. 6, 11). His testimony did supply evidence of the fact of damage; but it was by no means the sole source of such evidence.

This Court has held that a jury could find the "fact of damage" as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure the plaintiffs' business, *Bigelow v. RKO Pictures*, 327 U.S. 251 (1946). This rule is directly applicable in the instant case. "The mere unlawful combination over a period of time to eliminate competition is proof of damage, *Fox West Coast Theater Corp. v. Paradise Bldg. Corp.*, 264 F.2d, 602 (9th Cir. 1957); *Union Carbide and Carbon Corp. v. Nisely*, 300 F.2d 561 (10th Cir. 1961).

Although petitioner did not raise the issue, the court below found there was sufficient evidence of the fact of damage.[9a] The court below found that there

[9a] See statement of issues in Petitioner's brief in the lower court.

was ample evidence that Olson Farms conspired to fix depressed producer and wholesale prices (Pet. B-6, see also Pet. B-11). These acts, together with the other acts of monopolization referred to above (*supra* pp. 5-8) had, as their inexorable effect, the damaging of plaintiffs' business. The court of appeals stated (Pet. B-9):

> We think there was sufficient evidence of the *fact* that the plaintiffs did sustain some damage since there was ample statistical data and expert testimony describing depressed producer prices and the necessary concomitant-lost profits. As to the *quantum* of damage, the plaintiffs were under no burden to establish it with mathematical precision so long as the extent of damage was not left to jury speculation [citations omitted]. Without itemizing the testimony bearing on the damage question, our study of the voluminous record, consisting of some 7,500 pages of testimony, convinces us that the state of the record is such as to permit the jury to find and infer that plaintiffs did suffer legal injury.

In light of this finding, the unchallenged findings of the court below that Olson conspired to depress egg prices and to monopolize, and the above authorities, there is ample evidence of the "fact of damage."

Petitioner contends that "the appellate court failed to separate the legal basis for plaintiffs' damage claim (establishing the *fact* of damage) from the maze of evidence offered by plaintiffs to show the *quantum* of damage allegedly sustained" (Pet. p. 11). This contention entirely disregards the findings of the Court that Olson "succeeded in thus depressing . . . egg prices" (Pet. B-4), that "Olson Farms was acting in concert

with others to depress the prices paid to Utah-Idaho egg producers" (Pet. B-6); and that Olson dominated the Utah-Idaho egg market and "intended to control the egg producer paying price and, therefore, dominate the market . . ." (Pet. B-6).[10]

In sum, petitioner is flatly in error in stating that "[w]ithout Dr. Christensen's theory, there is no foundation for any showing that plaintiffs were in fact damaged" (Pet. p. 11).

2. The "question presented" for review by petitioner in its Petition for a Writ states: "Did the Tenth Circuit Court of Appeals follow decisions of this Court in considering the issue whether damage in fact had been proven?" (Pet. p. 2). Petitioner, however, argues a number of other issues in addition to the fact of damage, such as the sufficiency of the evidence as to the quantum of damages and the sufficiency of the evidence demonstrating that the Utah market area is a separate market. The latter two issues, however, are not properly before the Court. Rule 23(1)(c) of this Court's rules provides: ". . . Only the questions set forth in the petition or fairly comprised therein will be considered by the Court." Therefore, the petitioner is precluded from raising any issue as to the quantum of damage and as to market definition. *J. I. Case Co. v. Borak*, 377 U.S. 426, 428-29 (1964); *General Talking Pictures Corp.*

[10] Olson Farms contends that the court of appeals must simply have thrown "up their hands" and guessed that there was sufficient evidence of the fact of damage (Pet. p. 11). Certainly there is a strong presumption that the court of appeals properly and fully discharged its obligations of review, particularly in light of the fact that Olson Farms filed two briefs before that court totaling over 145 pages, and the plaintiffs filed a brief in that court containing 102 pages.

v. Western Electric Co., 304, U.S. 175, 177-78 (1938).

3. In any event, petitioner is in error in contending that there was inadequate evidence of the quantum of damage. Neither *Bigelow v. RKO Pictures*, 327 U.S. 251 (1946), nor any other case, holds that the so-called "yardstick" and the "before-after" tests are the only proper tests for measuring damages, as the petitioner suggests (Pet. pp. 10, 11). A number of cases have held that experts' opinions may be used to prove damages in antitrust cases. See *e.g. Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), appeal dismissed, 371 U.S. 801 (1961); *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 214 (9th Cir. 1964); *Banana Distributors v. United Fruit Co.*, 162 F. Supp. 32, 47 (S.D.N.Y. 1953); see also, Von Kalinowski, *Anti-Trust Laws & Trade Regulations, Section* 115.01 [3].

Plaintiffs could not have used the "before-after" method, in any event, because there was evidence that the conspiracy commenced when Olson first entered the market area in 1966 (see *e.g.* App. 483-84, 1032, 1943; Tr. 6575-73). There is also evidence that the conspiracy continued subsequent to the filing of the complaint on December 21, 1971. Accordingly use of this method of computing damages was not possible. Certainly there was not a shred of evidence at trial showing that the conspiracy had ended. A conspiracy is presumed to continue until affirmative evidence of its discontinuance is adduced. *United States v. Consolidated Laundries*

Corp., 291 F.2d 563 (2nd Cir. 1961). Neither was evidence of discontinuance of the conspiracy adduced at the hearing before the trial court in September, 1974, after which injunctive relief was entered.

In any event, the "before-offer" test is not likely to render a valid measure of damages in an industry such as agriculture where prices tend to gyrate wildly over a period of time.

The method of proving damages employed by plaintiffs was, in fact, a variant of the "yardstick" theory. Plaintiffs relied on the well-established theory that in a competitive market the price of a perishable agricultural commodity in a deficit area should equal the producer price in a surplus area plus the necessary transfer costs from the surplus to the deficit area. Both plaintiffs' and defendant's experts agreed on the basic theory—they simply disagreed on the amount of the transfer costs (see defendant's expert's testimony at Tr. 6737-6741 and see the damage exhibit of defendants D-8, p.2 employing the same theory). Other witnesses also supported the same theory, although they did not know what costs in addition to freight should be included in the transfer costs (App. 398, 461-62, 540-41). Petitioner is simply in error in contending that there is no basis for stating that Utah producers had never received anything more than the cost of freight over the California producer prices (Pet. p. 6); and it cites no authority whatsoever for that proposition (see Pet. p. 7).

It is misleading for Olson to assert that the plaintiffs compared "prices at two different functional levels

—Utah producers and California distributors" (Pet. p. 7) and that Dr. Christensen "postulated that a Utah distributor should be willing to pay a Utah egg producer the same as a California producer plus all of the costs incurred in buying eggs from California distributors and then transporting them to Utah . . ." (Pet. p. 6). Dr. Christensen's analysis went solely to determine actual transfer costs on the basis of the actual experience of the conspirators. The sole difference between Olson's and plaintiffs' damage theories was that Olson contended that the only transfer cost incurred was the cost of transportation—a proposition shown to be false by the long-time experience of all those who, in fact, imported eggs, including Olson itself (see Pl. Ex. 90, Tr. 1784).

Plaintiffs' computation of transfer costs did not compare prices received by Utah producers and California distributors. The comparison was between Utah producer prices and the California producer prices plus "transfer costs" to Utah as taken from the actual records of Olson Farms and its co-conspirators, Safeway, Inc., and Associated Food Stores, all of whom imported eggs from southern California over extended periods of time producer prices and the California producer prices plus and in substantial amounts.[11] Olson cannot now disavow its own theory.

In short, the evidence was sufficient to meet the

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[11] To arrive at damage calculation, it was then necessary to deduct the amount by which California producer prices were below Utah producers prices, when they were, from the "transfer costs."

standard stated in *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 124-25, (1969):

> 'The jury may make a just and reasonable estimate of the damages based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof' [citations omitted]. Any other rule would enable the wrongdoer to profit by his wrong-doing at the expense of his victim . . . Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery' . . .

4. Olson's contention that an error was committed in defining the Utah market area as a geographical market area under Section 2 of the Sherman Act is not encompassed within the question presented for review. In any event, it is clear that the term "any part of the trade or commerce among the several states . . ." as used in Section 2 of the Sherman Act has the same meaning as the term "line of commerce" under Section 7 of the Clayton Act, *United States v. Grinell Corp.*, 384 U.S. 563 (1966). There was abundant evidence to support the jury's finding that Utah constituted a distinct market area. It was the "target area" of Olson's monopolistic scheme; it was recognized by industry and governmental agencies as a market area in governmental and industry reports (see Pl. Ex. 286; and Pl. Ex. 188); the perishability of eggs and the deteriorating effect of transportation on eggs also tended to create a local market; there were substantial transfer costs involved

in transporting eggs from the nearest surplus area; the Utah market area constituted an area of effective competition; the direct routes of all the independent distributors (not those associated with chain stores) were solely within the Salt Lake-Provo-Ogden areas of Utah; and all of the Utah produced eggs were sold to local Utah distributors.

There certainly is no anomaly in using the price of eggs paid producers in California plus the transfer costs as the basis for computing damages. It is undisputed that the southern California area was the nearest area from which surplus eggs could be obtained in order to fill the needs of the Utah market area, and a market area need not have impermeable boundaries. In any event, a market definition is irrelevant to the section 1 claim.

CONCLUSION

We respectfully submit that the issue of the sufficiency of the evidence of the fact of damage raises no question warranting review by this Court. The issues concerning the measure of damages and the market definition were not properly raised in the questions presented, and, therefore, should not be considered on this Petition. In any event, they do not warrant plenary review because they raise no novel questions and pre-

sent no conflict among the courts of appeals. Accordingly, the respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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